

**OFFICIAL FILE**  
**ILLINOIS COMMERCE COMMISSION**

STATE OF ILLINOIS

**ILLINOIS COMMERCE COMMISSION**

**ORIGINAL**  
ILLINOIS  
COMMERCE COMMISSION

2005 MAY 16 A 10:17

CHIEF CLERK'S OFFICE

Illinois Commerce Commission )

On Its Own Motion )

v )

Docket No. 05-0202

CloseCall America, Inc. )

Removal of Carriers from List of )  
Telecommunications Carriers for failure )  
To file tariffs for the provision of local )  
Exchange telecommunications services )

*appearance and*

**MOTION TO DISMISS**

NOW COMES CloseCall America ("CloseCall America" or "Company") Inc., by and through its President, Thomas Mazerski, respectfully requests that this proceeding against CloseCall America be dismissed, and in support thereof states as follows:

I. On March 23, 2005, the Commission entered a citation order, based on a report from its Staff, requesting CloseCall America and other named respondents to show cause, if any, why the Commission should not rescind their Certificates of Service Authority and take other action because they had failed to file any tariffs for interexchange telecommunications service or not otherwise exercised their authority.

II. CloseCall America received its Certificate of Exchange Service Authority to provide competitive interexchange telecommunications service on or about September 14, 2001 in Docket number 00-0597. CloseCall America's certificates were for resold interexchange service.

1. Section 13-401(a) of the Public Utilities Act provides in relevant part, that:

"Unless exercised within a period of two years from the issuance thereof, authority conferred by a Certificate of Service Authority shall be "null or void." Emphasis added. 220 ILCS 5/13-401(a)

2. Section 13-501 of the Act further provides that:

"No telecommunications carrier shall offer or provide telecommunications service unless and until a tariff is filed with the Commission which describes the nature of service, applicable rates and other charges, terms and conditions of service, and the exchange,

exchanges or other geographical area or areas in which the service shall be offered or provided". 220ILCS 5/13-501.

4. "Exercised" is the active word in the relevant statute. "Exercise" when used as a noun, means "the discharge of an official function or professional occupation." "Exercise" when used as a transitive verb means, "to bring to bear, to use repeatedly in order to strengthen or develop." Webster's Seventh New Collegiate Dictionary, G & C Merriam Co., 1966, p. 291. CloseCall America has repeatedly exercised the authority from its certificate by transacting business in Illinois.

5. CloseCall America's certificate of authority authorized doing business in the State of Illinois. Section 5/13-401(a) of the Public Utilities Act provides in part:

"No telecommunications carrier not possessing a certificate of public convenience and necessity or certificate of authority from the Commission at the time this Article goes into effect shall transact any business in this State until it shall have obtained a certificate of service authority from the Commission pursuant to the provisions of this Article". Emphasis added 220ILCS 5/13-401(a).

6. CloseCall America's certificate of competitive service authority authorizes the provision of interexchange telecommunications service. Section 5/13-401(a) of the Public Utilities Act provides in part:

"No telecommunications carrier offering or providing, or seeking to offer or provide, any interexchange telecommunications service shall do so until it has applied for and received a Certificate of Exchange Service Authority pursuant to the provisions of Section 13-403". 220 ILCS 5/13-401(a)

7. As will be shown, CloseCall America has been lawfully exercising its certificate by transacting business in the state, pursuant to its certificate, since September 14, 2001.

8. The Commission's Order on page two expresses the Staff of the Illinois Commerce Commission's belief that the failure to file tariffs is evidence of a failure "to lawfully exercise the certificates."

9. CloseCall America believes it has lawfully exercised the authority conferred by its certificate of service authority and has done so within two years from September 14, 2001 by discharging official functions and conducting business.

#### CASE CITATION

1. The Commission has previously asserted that CloseCall America has authority to do business in Illinois on October 20, 2004 in ICC Docket 04-0408:

“Applicant, a Maryland corporation authorized to transact business in Illinois, seeks to offer resold local and interexchange and facilities-based local telephone service”. Emphasis added. ICC order in Docket 04-0408.

2. The Commission further states:

“The Commission, having considered the entire record herein and being fully advised in the premises, is of the opinion and finds that:  
(1) CloseCall America, Inc., a Maryland corporation authorized to transact business in Illinois, seeks a Certificate of Service Authority to provide resold and interexchange telecommunications service in Illinois;” Emphasis added. ICC order in Docket 04-0408.

3. The Commission found that as of October 20, 2004, CloseCall America maintained its authority to transact business in Illinois. As of that date the Commission had not moved to revoke the original Certificate of Service granted to CloseCall America on or about September 14, 2001 in Docket number 00-0597. The Commission states that CloseCall America is “authorized to transact business in Illinois”.

4. The Commission further asserts that it had “considered entire record”. In using “entire record” the Commission does not preclude any previous Dockets. Therefore, the Commission reaffirms in its October 20, 2004 Order that CloseCall America had properly maintained its Certificate of Service granted in Docket number 00-0597.

5. In its Order in Docket number 05-0202 the Commission does not show cause why it overrules its previous decision that CloseCall America is “authorized to transact business in Illinois”. Further, the Commission does not show that CloseCall America has materially altered its operations under said authority.

### **FILING REPORTS**

1. CloseCall America repeatedly discharged an official function by filing reports, lawfully exercising the certificates as required by Section 13-401(a) of Public Utilities Act. Such reports were filed within two years exercising the authority of the certificates as part of transacting business in the State of Illinois in the sense of 13-401(a) of the Public Utilities Act, 220ILCS13-401(a).

2. As recognized by the Commission Order in Docket 00-0597, the authority of the Company has not lapsed because it has made annual filings with the Commission showing its intent to continue to exercise its authority under the act. The first sentence of Section 13-401(a) has to do with transacting business and a certificate is required to do business. The filing of required ICC reports is a part of transacting business. The second part of Section 13-401(a) applies to the providing or seeking to provide local exchange telecommunication service. It has been shown that there is more than one way to fully exercise the authority conferred by a certificate within two years other than filing a tariff. Moreover, Section 13-401(a) does not require telecommunications services or filing of a tariff.

3. The Company has continued to file all the required forms exercising the authority under its certificate.

### **CHICAGO RAILWAY DISTINGUISHED**

1. Chicago Railway Company et al.v. The Commerce Commission ex rel. The Chicago Motor Coach Company, 336Ill.51 (1929), relied on by the Commission, may not be good law in the present competitive environment because it was predicated on facts that have changed. The Court there said "It is not the policy of the Public Utilities Act to promote competition between common carriers as a means of providing service to the public. The policy established by that act is, that through regulation of an established carrier occupying a given field and protection of it from competition the public will be serviced more efficiently and at a more reasonable rate than if other competing lines were authorized to render the same public service in the same territory" Chicago Railway supra 336Ill at 76.

2. The new law effective in 1986 has changed the policy to a competition friendly telecommunications regulation. Section 13-102(e) (f) and (g) of the Public Utilities Act provides:

(e) it is in the immediate interest of the People of the State of Illinois for the State to exercise its rights within the new framework of federal telecommunications policy to ensure that the economic benefits of competition in all telecommunications service markets are realized as effectively as possible;

(f) the competitive offering of all telecommunications service will increase innovation and efficiency in the provision of telecommunications services and may lead to reduced prices for consumers, increased investment in communications infrastructure, the creation of new jobs, and the attraction of new businesses to Illinois; and

(g) protection of the public interest requires changes in the regulation of telecommunications carriers and services to ensure, to the maximum feasible extent, the reasonable and timely development of effective competition in all telecommunications service markets. 220ILCS4/13-102(e) (f) (g).

3. This obvious shift in emphasis detracts from the importance of the anticompetitive language in the Chicago Railways case. Chicago Railways was cited by the Commission in this docket as its authority for the position that “failure to lawfully exercise the certificates as evidenced by the failure to file tariffs, has caused the authorities to lapse as a matter of law. No revocation is necessary to revoke the certificate.” However, the Commission seemingly recognized the shift to a competitive friendly market by allowing CloseCall America “to adduce evidence with respect to matters stated hereinabove and to show cause, if any there be, why the Commission should not rescind the certificates of service authority...” ICC Order Docket 05-0201.

4. As previously shown, and as apparently recognized in the Order in Docket 05-0201, there is more than one way to exercise the authority granted by a certificate of service authority.

5. But assuming that the 1929 Chicago Railways case still has viability, there are some significant distinguishing aspects. First, the Supreme Court found there were no facts to support the certificate of convenience and necessity and the order “is therefore void” Chicago Railways. Supra 336/Ill. At 66. Second, the Commission amended Chicago Railway’s certificate to grant authority in the territory where they were competing with Chicago Motor Coach Company without notice to Chicago Motor Coach Company. “They were entitled to notice before the amendment was made, and since none was given, the order making the amendment was void.”

Chicago Railways. Supra, 336Ill. at 67. The court went on to say that where two routes are authorized by a Certificate “the service of motor buses carrying passengers on one street or by one route is a different service from...carrying passengers on another street by another route...”

Chicago Railways 336 Ill. at 69. The Court concluded that failure to use the other route caused the certificate for that route to be null and void even though they had used the first route. The Chicago Railways case does not interpret the word “exercise,” and it did not involve the filing of a tariff.

6. There are other distinguishing characteristics, which make the strict interpretation of Chicago Railways inapplicable to CloseCall America:

A. There is a difference between telecommunications certificates and ones for railways and buses.

B. CloseCall America’s citation case Docket 04-0408, reaffirmed its authority to transact business in Illinois.

C. CloseCall America has continued to transact business in exercise of its authority under its certificate by filing Annual Reports and tax forms with the Commission.

D. Chicago Railway supra 336 Ill. 51 (1929) was decided at a time when it was not the policy of the Public Utilities Act to promote competition, but the policy has changed to competitive friendly regulation. Moreover, CloseCall America is certificated for competitive interexchange telecommunications service “in the State of Illinois.” See ICC Order in Docket 00-0597 at p.3.

E. CloseCall America was given a certificate to do what they Chicago Railway case said they could not do, i.e. compete with carriers anywhere in Illinois. Chicago Railway supra 336 Ill. at 77.; Sec 220 ILCS 5/13-103(b).

WHEREFORE, CloseCall America respectfully requests that the proceeding against it be dismissed.

Respectfully submitted,

CLOSECALL AMERICA

By:

President

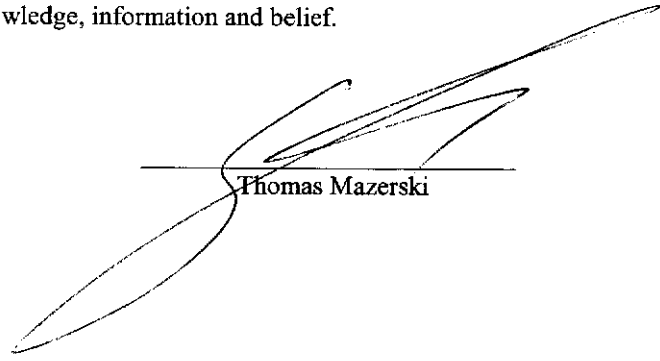
Thomas Mazerski  
CloseCall America, Inc.  
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STATE OF MARYLAND            )  
  ) SS  
QUEEN ANNES COUNTY        )

**VERIFICATION**

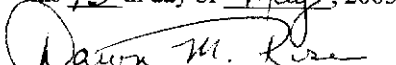
The undersigned, Thomas Mazerski, being first duly sworn on oath, deposes and states  
the he is the President of CloseCall America, Inc; that he has read the above and foregoing Motion  
and has knowledge of the statements of fact contained therein; and that the contents of said Motion  
are true and correct to the best of his knowledge, information and belief.



  
Thomas Mazerski

Subscribed and sworn to before me

this 13 th day of May, 2005

  
Notary Public

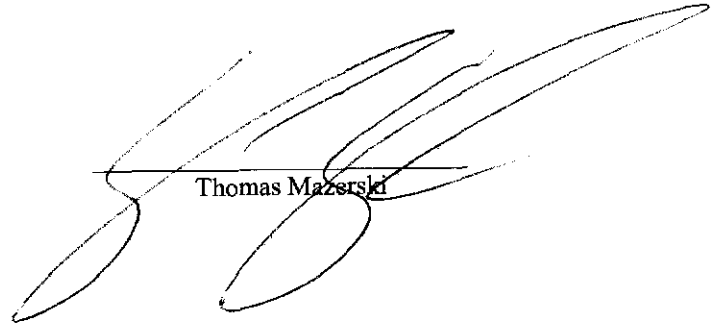
DAWN M. ROSE  
NOTARY PUBLIC STATE OF MARYLAND  
My Commission Expires August 10 2005



CERTIFICATE OF SERVICE

05-0202

The undersigned, Thomas Mazerski hereby certifies that on the 13<sup>th</sup> day of May, 2005, he served a copy of the foregoing instrument by personally delivering a copy thereof and/or mailing a copy thereof by electronic mail and/or United States Mail, postage prepaid, at Springfield, Illinois to the individuals named on the attached service list.



Thomas Mazerski

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## ILLINOIS COMMERCE COMMISSION

Service List in 05-0202 for 5/13/2005

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Address	Type	Party of Record	Date Added	Date Removed
Curtis Baird President Neon Telephone, Inc. 1050 Reed Station Rd., Ste. A Carbondale, IL 62901	RES	Yes	3/24/2005	

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Ingrid J. Bedoya Director of Operations Easy Call, Inc. 4214 W. Lawrence Ave. Chicago, IL 60630	RES	Yes	3/24/2005	
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Russell M. Blau Atty. for RCN Telecom Services, Inc. Swidler Berlin LLP 3000 K St., NW, Ste. 300 Washington, DC 20007	INT	Yes	4/12/2005	
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Document Processor C T Corporation System 208 S. LaSalle St. Chicago, IL 60604	RES	Yes	3/24/2005
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Document Processor	RES	Yes	3/24/2005
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Illinois Corporation Service Company  
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Document Processor Corporation Service Company 422 N. Northwest Hwy., Ste. 150 Park Ridge, IL 60068	RES	Yes	3/24/2005
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Document Processor CI2, Inc. National Corporate Research, Ltd. 615 S. DuPont Hwy. Dover, DE 19901	RES	Yes	3/24/2005
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Kurt Scholle Manager Novacon LLC 1895 Rohlwing Rd., Ste. C Rolling Meadows, IL 60008-4803	RES	Yes	3/24/2005
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David J. Segneri President Telecourier Communications Corporation 520 N. Center St. Bloomington, IL 61701-2902	RES	Yes	3/24/2005
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Elizabeth D. Sharp Loop Telecom, L.P. 330 S. Wells St., Ste. 706 Chicago, IL 60606	RES	Yes	3/24/2005
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John M. Sheahin Communication Discount Services, Inc. 529 W. Roosevelt Rd. Wheaton, IL 60187	RES	Yes	3/24/2005
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Pamela H. Sherwood Vice President Regulatory-Midwest Region Time Warner Telecom of Illinois LLC 4625 W. 86th St., #500 Indianapolis, IN 46268	RES	Yes	3/24/2005
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Mark Shmikler President EZ RECONNECT, LLC 7720 W. 99th St. Hickory Hills, IL 60457	RES	Yes	3/24/2005
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Christopher J. Townsend Association Management Resources, Inc. DLA Piper Rudnick Gray Cary US LLP 203 N. LaSalle St., Ste. 1500 Chicago, IL 60601-1293	RES	Yes	3/24/2005
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Sam Vogel Metropolitan Telecommunications of Illinois d/ba MetTel 44 Wall St., 6th Fl. New York, NY 10005	INT	Yes	4/1/2005
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Jason Wakefield Covad Communications Company 100 Congress Ave., Ste. 2000 Austin, TX 78701	RES	Yes	3/24/2005
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Steve Wicker Illinois IntraNetwork, Inc. 331 Fulton, Ste. 840 Peoria, IL 61602	RES	Yes	3/24/2005
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W. Don Williams V.P. of Operations Comdata Telecommunications Services, Inc. 5301 Maryland Way Brentwood, TN 37027	RES	Yes	3/24/2005
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Ried Zulager Cogent Communications of Illinois, Inc. 1015 31st St. N.W. Washington, DC 20007	RES	Yes	3/24/2005
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